

Exhibit C

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF TEXAS
3 AUSTIN DIVISION

4 INTELLECTUAL VENTURES,) Docket No. A 19-CA-1075 ADA
5 LLC)
6 vs.) Austin, Texas
7)
8 VMWARE, INC.) January 31, 2020

9 -----

10 UNITED STATES DISTRICT COURT
11 WESTERN DISTRICT OF TEXAS
12 WACO DIVISION

13 PARUS HOLDINGS, INC.) Docket No. A 19-CA-432 ADA
14)
15 vs.) Waco, Texas
16)
17 APPLE, INC., ET AL) January 31, 2020

18 -----

19 TRANSCRIPT OF MOTION HEARING
20 BEFORE THE HONORABLE ALAN D. ALBRIGHT

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08:59:13 1 THE CLERK: Motion hearing in Civil Actions

08:59:18 2 1:19-CV-1075, styled, Intellectual Ventures I and II, LLC

08:59:23 3 vs. VMware, Incorporated, Civil Case No. W-19-CV-432,

08:59:29 4 styled Parus Holdings, Incorporated vs. Apple,

08:59:33 5 Incorporated, and Civil Action No. W-19-CV-612, styled

08:59:40 6 Gabriel De La Vega vs. Microsoft Corporation.

08:59:44 7 THE COURT: Good morning, everyone. All my

08:59:47 8 favorite lawyers in one place. How lucky can I get. I

08:59:52 9 shouldn't even get paid to have to work today.

08:59:55 10 If you all would be so kind as to start off and,

08:59:57 11 I guess, if you -- we can go in the order that Suzanne

09:00:01 12 just called the cases. We'll start with IV vs. VMware,

09:00:05 13 Inc., and if the lawyers would address and identify

09:00:08 14 themselves. Josh is already telling me something I need

09:00:18 15 to do. So I try and do everything that Suzanne and Josh

09:00:23 16 tell me to do.

09:00:24 17 So if I could hear from the IV lawyers and then,

09:00:26 18 from the lawyers for VMware.

09:00:30 19 MR. GILLILAND: Your Honor, Derek Gilliland on

09:00:32 20 behalf of IV, and with me today is Bob Gilman and John

09:00:36 21 DeBlois. And also in the gallery is representative of IV

09:00:39 22 Chuck Ebertin. We're ready to proceed.

09:00:42 23 THE COURT: And, Mr. Gilliland, who will be

09:00:43 24 speaking on y'all's on behalf?

09:00:47 25 MR. GILLILAND: Mr. Gilman will be arguing for

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09:00:48 1 IV.

09:00:48 2 THE COURT: Mr. Ravel, your at least up front.

09:00:51 3 Or.

09:00:51 4 MR. RAVEL: I'm in the next case, Parus against

09:00:53 5 Apple. And for Apple is Bitia Rahebi and me. We'll be

09:00:57 6 splitting the argument. And our client, Natalie Pous, in

09:01:00 7 from Cupertino.

09:01:01 8 THE COURT: And immediately behind you is?

09:01:03 9 MS. VIDAL: Kathy Vidal. I'm here with William

09:01:06 10 Logan, my colleague, representing VMware. And in the

09:01:09 11 gallery is my client, Danielle Coleman, from VMware.

09:01:11 12 THE COURT: And, Ms. Vidal, who will be speaking

09:01:15 13 on behalf of VMware?

09:01:16 14 MS. VIDAL: I will, your Honor.

09:01:17 15 THE COURT: Very good.

09:01:18 16 Okay. Well, then, let's start with that case.

09:01:19 17 Before we hear from the lawyers, let me tell you a couple

09:01:22 18 of things that you probably have all heard me say in the

09:01:26 19 past about these general issues. More notes? Okay.

09:01:35 20 Suzanne tells me there's an attorney I need to have sworn

09:01:36 21 in. If that's true, just let me know whenever that case

09:01:40 22 comes up, and I'll be happy to do that.

09:01:42 23 Couple of things I just generically feel about

09:01:48 24 the arguments on infringement, contributory infringement,

09:01:53 25 willful infringement, and some of the others, in terms of

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09:01:55 1 notice. Number one is, I don't -- you know, I don't feel
 09:02:02 2 like -- I'm not often going to be persuaded by an argument
 09:02:06 3 that -- I'm just picking out until I'm not even sure --
 09:02:12 4 I'll pick on anyone who's here, Microsoft or anyone. The
 09:02:17 5 fact that they may have gone and gotten a patent and
 09:02:20 6 somewhere in one of those patents, they identify the
 09:02:24 7 patent that is being is asserted, that's not going to be
 09:02:28 8 good enough to me for actual notice. I think there
 09:02:35 9 actually needs to be some kind of formal notice. And it
 09:02:41 10 might not have to be the old-fashioned send a letter,
 09:02:43 11 notice, or anything like that, but there actually needs to
 09:02:46 12 be some notice of an awareness of the patent for the
 09:02:50 13 period to begin running.

09:02:52 14 That being said, I know that many on the
 09:02:57 15 plaintiff's side of the bar would be concerned, you know,
 09:03:00 16 about the information they have when they file pleadings,
 09:03:06 17 their ability to do this. And if they don't make the --
 09:03:09 18 if they don't make the accusation in the initial pleading,
 09:03:13 19 a fear that they won't be able to make the accusation.

09:03:17 20 I want to ensure everyone in here that the way I
 09:03:20 21 see it is, there will be a period of time after the
 09:03:26 22 Markman, once the discovery begins, where it will be a
 09:03:32 23 relatively short period of time, probably about three
 09:03:35 24 months, but you will -- the plaintiffs will have a
 09:03:39 25 baked-in period of time in every case where they can take

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09:05:14 1 example, willfulness and give you an opportunity to amend
 09:05:17 2 your pleadings, one of my favorite sayings when people
 09:05:23 3 argue in front of the Supreme Court is, I'm not sure it's
 09:05:25 4 worth the candle. I'm not even sure I know exactly what
 09:05:28 5 that means, but it's a cool phrase, and I think it applies
 09:05:32 6 here. I'm not sure why it's worth a candle to be fighting
 09:05:35 7 over all this. So that's my general perspective.

09:05:39 8 So with all that background, Ms. Vidal.

09:05:42 9 MS. VIDAL: Thank you, your Honor. With that
 09:05:45 10 background, I believe I can rest.

09:05:47 11 THE COURT: You are probably pretty close to it.
 09:05:50 12 Really, what I'm most interested in and the reason I set
 09:05:53 13 the hearing in this manner and have as many of these cases
 09:05:57 14 as possible is, I thought, you know, my perspective --
 09:06:01 15 getting my general perspective out to really good
 09:06:04 16 plaintiff's lawyers, to really well-established
 09:06:08 17 plaintiff's groups like Intellectual Ventures, really good
 09:06:14 18 defense lawyers. Some of my all-time favorites are
 09:06:16 19 sitting over here.

09:06:16 20 And I guess I can't say Stephen Burbank is my
 09:06:20 21 favorite clerk since Josh is sitting in front of me, but
 09:06:23 22 I'll say that he was my favorite former clerk.

09:06:27 23 But part of the reason of having this many people
 09:06:29 24 attend -- and it's great the corporate representatives are
 09:06:33 25 here -- is to get across my general philosophy. So, you

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09:03:42 1 discrete discovery on the issue -- these specific issues,
 09:03:46 2 and if they determine that there was knowledge of the
 09:03:51 3 patent, then leave will be given -- granted very liberally
 09:03:56 4 and allow -- to allow the plaintiffs to amend their
 09:04:01 5 pleadings, as long as they get it done quickly enough
 09:04:04 6 during the discovery period of time to allow additional
 09:04:07 7 discovery to take place on behalf of the defendants.

09:04:10 8 But I'm not going to be receptive to defendant
 09:04:15 9 saying, they should have pled it originally because we
 09:04:17 10 have a lot of lawyers here who are unhappy that it was
 09:04:20 11 pled in the initial pleadings. And so, I'm thinking
 09:04:24 12 that's the better way to do it.

09:04:26 13 So, Mr. Gilman, having -- or, actually, I guess,
 09:04:29 14 Ms. Vidal, it's your -- it will be y'all's motions, but
 09:04:32 15 that's the context I see all in this is sort of a
 09:04:36 16 balancing of issue. And I will tell you that there may be
 09:04:42 17 slightly more weight on the plaintiff's side to explain to
 09:04:47 18 me why it makes a difference that you all are able to
 09:04:50 19 maintain an accusation or an allegation of willfulness or
 09:04:56 20 the other issues that we're here for.

09:05:01 21 If you know that I'm going to give you the
 09:05:04 22 opportunity to -- Mr. Gilman, I'm sorry, I'm picking on
 09:05:05 23 you. I'm looking at you, but it's true for all the
 09:05:07 24 plaintiffs. As long as you are aware that I'm going to
 09:05:11 25 make -- give you the opportunity to establish, for

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09:06:38 1 know, frankly, it might be better for me to hear from Mr.
 09:06:40 2 Gilman, after everything I've said, about what his
 09:06:43 3 thoughts are about what IV would like to do unless you
 09:06:46 4 have something you'd like to say.

09:06:47 5 MS. VIDAL: If you'd like me to create a record
 09:06:49 6 on the five patents, I'm happy to, but if it's --

09:06:52 7 THE COURT: We've been through all of them. Josh
 09:06:54 8 and I have spent a lot of time getting ready for this
 09:06:57 9 hearing, and so, I don't think it's necessary for the
 09:06:59 10 record; and it won't help me because Josh and I have gone
 09:07:03 11 -- we've gone through all the stuff pretty carefully.

09:07:06 12 MS. VIDAL: And, your Honor, one other thing.

09:07:08 13 THE COURT: Yes, ma'am.

09:07:08 14 MS. VIDAL: Your chambers brought the Romag
 09:07:11 15 decision to our attention. Is there something that you
 09:07:12 16 wanted us to address on that, or was that for other
 09:07:15 17 defendants and plaintiffs?

09:07:16 18 THE COURT: No.

09:07:16 19 Generally speaking, I was listening to the oral
 09:07:21 20 arguments and I -- and I worried about sending it out
 09:07:25 21 because at least some you would say he doesn't even
 09:07:28 22 realize it's a trademark case and I did. And so, I get
 09:07:32 23 that. But when I heard, I think it was, Justice
 09:07:37 24 Kavanaugh -- pretty sure it was Kavanaugh. He was
 09:07:40 25 articulating issues about what -- you know, for

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09:07:43 1 willfulness, what willfulness means in terms of actual
09:07:46 2 knowledge.
09:07:47 3 I think that that -- the way he was asking it, I
09:07:52 4 don't know at least in his mind or some of the other
09:07:55 5 justices that they would really see it much in difference
09:07:59 6 in terms of the willfulness standard between the different
09:08:02 7 IP groups. And it sounded to me like an indication from
09:08:06 8 at least one justice what he thought actual knowledge
09:08:09 9 might -- sufficient knowledge might be.
09:08:12 10 So I just wanted you all to have heard, you know,
09:08:16 11 be aware of that, as well, because I think that's -- as a
09:08:19 12 lower court, I think I should be informed by what those
09:08:23 13 cases that are going on, and I thought you guys just ought
09:08:27 14 to be aware of that.
09:08:28 15 MS. VIDAL: And I appreciate that. Since
09:08:29 16 willfulness is not in our case, I'll leave that to the
09:08:31 17 other counsel to address.
09:08:32 18 THE COURT: I mean, y'all have better lives than
09:08:34 19 I do because you probably don't walk around listening to
09:08:36 20 Supreme Court arguments in Waco. But that's what you have
09:08:40 21 to do in Waco is listen to Supreme Court arguments. And
09:08:43 22 so, I thought it was informative. No. That's it.
09:08:46 23 MS. VIDAL: Thank you, your Honor.
09:08:46 24 THE COURT: Mr. Gilman.
09:08:55 25 MR. GILMAN: Thank you, your Honor. Bob Gilman

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09:10:06 1 it's not alleged, so we're not going to answer it. That
09:10:08 2 would be very poorly received by me.
09:10:12 3 I think the much better way of doing it is to --
09:10:18 4 if you have a case where there is actual notice and I
09:10:20 5 think there's one here where either, you know, we have
09:10:22 6 that or close to that situation, then obviously that's
09:10:25 7 fine.
09:10:25 8 But I think I agree with, you know, having done
09:10:30 9 cases on both sides, I can appreciate why, for example,
09:10:34 10 Apple doesn't want to have these allegations that may or
09:10:38 11 may not be substantiated in the original complaint or even
09:10:41 12 amended complaint; but at the same time, they should not
09:10:46 13 to not have to provide you with discovery because you
09:10:48 14 didn't plead it in the initial complaint or the amended
09:10:52 15 complaint.
09:10:52 16 So yes, you would -- within reason, you would be
09:10:57 17 -- have total access to discovery to establish these other
09:11:00 18 claims.
09:11:01 19 MR. GILMAN: All right. That's appreciated, your
09:11:02 20 Honor. If we walk out of here having that statement, then
09:11:04 21 I think, you know.
09:11:05 22 THE COURT: I think I speak a fair amount, and
09:11:08 23 that's one of the things I always try to get across is,
09:11:10 24 that's my view on discovery. And for those of you who
09:11:15 25 have not been in front of me before on other matters,

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09:08:56 1 for Intellectual Ventures.
09:08:57 2 Yeah, given the comments you made just now, I
09:09:01 3 think we agree with you, it's not worth the candle. You
09:09:04 4 know, frankly, our biggest concern through this motion
09:09:07 5 practice is that we're able to obtain discovery. You
09:09:10 6 know, we're going to get up here and argue that the better
09:09:13 7 procedural way to handle this is to not dismiss it and
09:09:15 8 deal with it. You know, as I think you recognized a
09:09:18 9 little bit in the Parity case, it's the scope of the
09:09:21 10 damage should be a factual issue.
09:09:22 11 But, really, if this is the way we're going to
09:09:26 12 proceed but we're going to be able to get discovery on
09:09:29 13 some items, even some things we discovered after filing
09:09:31 14 the complaint on our own that lead us to believe that we
09:09:33 15 might find something in VMware discovery that would show a
09:09:36 16 notice date before the filing of the patent in suit. If
09:09:38 17 we could get that discovery, I think we're fine.
09:09:40 18 THE COURT: And, actually, you said it better
09:09:42 19 than I did, which is pretty typical of the way things go
09:09:46 20 here.
09:09:46 21 But, actually, one of the things I was also
09:09:50 22 trying to intimate was, I would not be receptive to having
09:09:55 23 defendants tell plaintiffs, you can't ask discovery on the
09:09:58 24 issues of willfulness or a factual underpinning of direct
09:10:03 25 and indirect -- any of the others because you didn't --

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09:11:19 1 either, with regard to discovery, I'm a very hands-on
09:11:26 2 judge. And my attitude is, for example, I'm not saying
09:11:31 3 there will be a problem, but let's say -- I'm just using
09:11:33 4 you because you're first up.
09:11:34 5 Were you to have sent something to Apple or
09:11:40 6 someone else and, you know, my -- number one, my
09:11:43 7 expectation is that you oughta do whatever you need to do
09:11:45 8 to protect your client's rights and be as aggressive as
09:11:48 9 that is. And I think, for example, Ms. Vidal ought to do
09:11:51 10 the same for her client. I expect that. I know her very
09:11:55 11 well and I know you and, you know, I know Mr. Gilliland.
09:12:00 12 I expect it to be gracious, the way you treat each other,
09:12:04 13 but vigorous, the way you do it.
09:12:05 14 So I don't -- I don't expect anyone to just say,
09:12:09 15 oh, well, we probably shouldn't do this, but we will. I
09:12:12 16 get that. Or vice versa. But if you have that issue, I
09:12:16 17 also don't want, which I've had recently, where there are
09:12:20 18 two weeks of back-and-forth e-mails saying -- you know, if
09:12:25 19 you all can't get something resolved like this in a phone
09:12:30 20 call, then just call -- I told them yesterday, I'm going
09:12:33 21 to have shirts made up that say, call Dr. Yi. He probably
09:12:38 22 wouldn't want me to do that.
09:12:39 23 But, you know, if you will just let us know after
09:12:43 24 a shorter period of time, you can't get something
09:12:46 25 resolved, so far, I think we've been able to get -- have

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09:12:49 1 telephonic conferences within the next day or so.

09:12:54 2 And like yesterday, I lost an hour of my life,

09:12:57 3 but we got it resolved and I was happy when I left and

09:13:02 4 they were happy. So no one in here should feel like

09:13:07 5 they're giving anything up by any ruling because we will

09:13:13 6 be available to resolve anything virtually within 24 hours

09:13:17 7 that you -- any dispute that y'all have.

09:13:19 8 MR. GILMAN: Well, that's fantastic. That's

09:13:21 9 appreciated and refreshing. So.

09:13:22 10 THE COURT: Well --

09:13:23 11 MR. GILMAN: Appreciate that.

09:13:24 12 THE COURT: You know, I've only been on the bench

09:13:26 13 a year and a half. They haven't beaten the patience out

09:13:29 14 of me yet.

09:13:30 15 Is there anything else you wanted to say?

09:13:32 16 MR. GILMAN: No, your Honor.

09:13:32 17 THE COURT: Okay.

09:13:32 18 MR. GILMAN: Thank you for the time.

09:13:33 19 THE COURT: You bet.

09:13:39 20 So we are going to probably -- I can't say I

09:13:44 21 remember for each one, but, for example, Ms. Vidal, in

09:13:48 22 this case, would your clients be satisfied from what I've

09:13:53 23 said with a dismissal without prejudice of the claims with

09:13:58 24 which you're unhappy, with the understanding that

09:14:00 25 discovery's going to be taken at the appropriate time?

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09:15:25 1 expect anyone to abandon their positions by having gotten

09:15:28 2 the preliminary constructions. It's really, again, to

09:15:30 3 help you all out.

09:15:31 4 The discovery's stayed until the Markman, but for

09:15:34 5 example, the case today, at the end of the hearing today,

09:15:37 6 they will have the Markman constructions, and on Monday,

09:15:40 7 they can start discovery. And so, on Monday, if they have

09:15:44 8 these issues, for example, that Mr. Gilman had, I would

09:15:47 9 expect them get discovery out immediately so that it can

09:15:52 10 get -- they know one way or the other, and they can get

09:15:54 11 their pleadings amended quickly enough to allow the

09:15:57 12 discovery in the rest of the case.

09:15:59 13 So the next case up is Parus, which is P-A-R-U-S,

09:16:08 14 Holdings vs. Apple.

09:16:13 15 Mr. Ravel and --

09:16:16 16 MR. DEVOOGD: Drew DeVoogd for Parus, your Honor.

09:16:19 17 THE COURT: Pleased to meet you, sir.

09:16:22 18 MR. DEVOOGD: Likewise, your Honor.

09:16:24 19 MR. RAVEL: I'll begin with a question, rather

09:16:26 20 than with an argument. If the question is, would Apple be

09:16:29 21 satisfied with a dismissal without prejudice as to

09:16:32 22 willfulness, indirect infringement, and the request for

09:16:34 23 permanent injunction? The answer to that question would

09:16:37 24 be yes, subject to cooperating in discovery immediately

09:16:42 25 after it starts and not filing any silly oppositions to

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09:14:03 1 MS. VIDAL: VMware would be very happy with that,

09:14:05 2 your Honor. Thank you.

09:14:06 3 THE COURT: And, Mr. Gilman, you're okay with

09:14:07 4 that?

09:14:08 5 MR. GILMAN: Yes, your Honor.

09:14:08 6 THE COURT: Okay. Very good then.

09:14:12 7 Then next up -- and I think this is clear to

09:14:16 8 everyone in here. I recognize most of the faces. But,

09:14:19 9 you know, discovery will start immediately after the

09:14:22 10 Markman. And with my Markmans, if you haven't been in

09:14:26 11 front of me before, there's one this afternoon. In fact,

09:14:30 12 I know I'm babbling, but we are trying to start a new

09:14:35 13 process.

09:14:36 14 We sent out preliminary constructions yesterday

09:14:40 15 to the parties that are going to be at the Markman. I'm

09:14:44 16 thinking that's what we'll do from now on. Maybe not as

09:14:49 17 far in advance as we did in this case. This hearing got

09:14:53 18 bumped, so we were a little ahead of time.

09:14:55 19 But you should start anticipating to have

09:14:58 20 preliminary constructions by 5:00 the day before so that

09:15:04 21 you know when you come in here. They are only preliminary

09:15:07 22 constructions. You know, the reason I'm giving them is, I

09:15:13 23 have found, a couple of times now, where we've given our

09:15:18 24 own construction and people said, we can live with that.

09:15:21 25 And so, it saved them the time of preparing for -- I don't

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09:16:47 1 amended pleadings.

09:16:48 2 THE COURT: And what do you say on behalf of

09:16:51 3 Parus?

09:16:52 4 MR. DEVOOGD: I'd be happy to proceed in that

09:16:54 5 manner, your Honor.

09:16:55 6 THE COURT: Okay. Very good.

09:17:00 7 And then, do we have anyone for De La Vega vs.

09:17:12 8 Microsoft?

09:17:12 9 MR. SHELTON: Yes, your Honor. Barry Shelton.

09:17:13 10 THE COURT: Oh, I'm sorry. I assumed these other

09:17:15 11 Parus cases were all together. I should ask for Google,

09:17:17 12 LG Electronics, Samsung and Amazon, whether there's any

09:17:20 13 difference in the positions you all would take like Mr.

09:17:24 14 Ravel did. If so -- and if you would introduce yourselves

09:17:27 15 on the record, just make sure that we get it down, one at

09:17:30 16 a time, and who you represent.

09:17:32 17 MR. SNYDER: Darin Snyder and Stephen Burbank,

09:17:35 18 along with our representative Timur Engin from Google,

09:17:39 19 LLC. And then, Stephen Burbank and Darin Snyder for LG

09:17:42 20 Electronics, Incorporated and LG Electronics USA,

09:17:45 21 Incorporated.

09:17:45 22 THE COURT: And what would your position be?

09:17:45 23 And, Lily, can you hear him from there or do you want him

09:17:45 24 to come up?

09:17:45 25 COURT REPORTER: If you could move the mic closer

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09:17:54 1 to you, please.

09:17:54 2 MR. SNYDER: Good morning, your Honor. Darin

09:17:55 3 Snyder with O'Melveny & Myers.

09:17:56 4 Granting our motion without prejudice to the

09:17:58 5 plaintiff later taking discovery would be acceptable to

09:18:03 6 Google and LG.

09:18:04 7 THE COURT: Okay. Yes, ma'am.

09:18:08 8 MS. MAROULIS: Good morning, your Honor.

09:18:09 9 Victoria Maroulis, counsel for Samsung in the

09:18:14 10 Parus case.

09:18:14 11 And as with other defendants, we're satisfied

09:18:16 12 with dismissing the claims without prejudice and having

09:18:19 13 discovery later. Thank you, your Honor.

09:18:21 14 THE COURT: Okay. Yes, sir.

09:18:25 15 MR. RANGANATH: Good morning.

09:18:25 16 Ravi Ranganath, Fenwick & West, for Amazon. And

09:18:28 17 our position is the same as the other defendants.

09:18:29 18 THE COURT: And last, but not least, my favorite

09:18:33 19 Barry Shelton.

09:18:34 20 MR. SHELTON: Your Honor, I'm local counsel

09:18:35 21 for Amazon.

09:18:35 22 THE COURT: Okay. Very good.

09:18:37 23 So does that take care of all of the Parus

09:18:40 24 Defendants?

09:18:41 25 MR. DEVOOGD: Your Honor.

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09:19:51 1 Google's counsel, if they need to say something.

09:19:54 2 MR. DEVOOGD: Thank you, your Honor. I just need

09:19:55 3 to retrieve my binder with your indulgence.

09:19:57 4 THE COURT: Okay.

09:19:58 5 MR. DEVOOGD: Thank you.

09:20:16 6 THE COURT: And your -- is this the case where

09:20:19 7 there may have been some actual notice that you would like

09:20:21 8 to articulate?

09:20:23 9 MR. DEVOOGD: That's correct, your Honor. And I

09:20:24 10 also had some thoughts on the Romag Fasteners argument.

09:20:26 11 THE COURT: Great.

09:20:28 12 MR. DEVOOGD: It's more academic, so we can defer

09:20:30 13 that discussion, if you'd like.

09:20:33 14 THE COURT: No. I'm happy to have it.

09:20:35 15 MR. DEVOOGD: Okay. So as I heard that argument,

09:20:38 16 the issue that Justice Kavanaugh and, I believe, Justices

09:20:42 17 Kagan and Sotomayor were addressing is whether or not the

09:20:46 18 specific requirement for willfulness under the classic

09:20:53 19 principles of equity that the courts have applied in this

09:20:56 20 country for the past 200 years that are committed to the

09:21:01 21 district court's discretion within those parameters of

09:21:04 22 those classic equitable principles can be satisfied

09:21:09 23 without actual notice.

09:21:12 24 And from our perspective and the way I read the

09:21:15 25 cases in forming with respect to these particular

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09:18:41 1 THE COURT: Yes, sir.

09:18:42 2 MR. DEVOOGD: If I may, Drew DeVoogd for Parus

09:18:45 3 Holdings. I'm the attorney who would like your indulgence

09:18:49 4 to get sworn in. Would you like to do that now? We can.

09:18:52 5 Or reserve till after the hearing?

09:18:54 6 THE COURT: Nothing would make me happier than to

09:18:56 7 swear you in right now, in front of all these people. So

09:18:57 8 if you'll come up.

09:19:01 9 MR. DEVOOGD: And I also have a couple of

09:19:03 10 additional comments.

09:19:04 11 THE COURT: Okay.

09:19:05 12 MR. DEVOOGD: At least with respect to the Google

09:19:07 13 case.

09:19:07 14 THE COURT: Okay. Let me swear you in; that way,

09:19:09 15 you're all official. If you would raise your right hand

09:19:15 16 and repeat after me:

09:19:17 17 I do solemnly swear that I will discharge the

09:19:20 18 duties of attorney and counselor of this court faithfully.

09:19:28 19 That I will demean myself uprightly under the law in the

09:19:34 20 highest ethics of our profession. I will support and

09:19:39 21 defend the Constitution of the United States.

09:19:45 22 Congratulations.

09:19:47 23 MR. DEVOOGD: Thank you, your Honor.

09:19:47 24 THE COURT: Now, let me hear what it is you would

09:19:49 25 like to add about Google, and then, I'll hear from

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09:21:19 1 allegations under Halo, that line of cases does not

09:21:27 2 preclude a finding of willfulness, i.e., an award of

09:21:37 3 enhanced damages without actual notice under the rubric of

09:21:41 4 willful blindness. And so, I can provide some additional

09:21:45 5 case citations.

09:21:45 6 THE COURT: I think you and I are probably in

09:21:47 7 agreement on that. And I think -- and Halo was kind of

09:21:49 8 touched on a little bit in those arguments, as well, and I

09:21:52 9 think they were trying to make that point.

09:21:54 10 MR. DEVOOGD: Absolutely. It's a sliding scale.

09:21:56 11 THE COURT: Right. I think so, too.

09:21:57 12 MR. DEVOOGD: And you have the discretion to

09:21:59 13 assess the evidence before you and make a determination

09:22:01 14 based on that evidence.

09:22:02 15 THE COURT: Yeah. And I got the feeling, even

09:22:05 16 though he's like a thousand times smarter than me, that

09:22:09 17 Justice Kavanaugh was -- it was more of kind of not

09:22:12 18 academic but sort of a -- he's not really in the trenches

09:22:16 19 ever having to do the balancing himself. He gets it once

09:22:19 20 the balancing has taken place. And he was trying to find

09:22:22 21 whether or not there was a bright line.

09:22:23 22 MR. DEVOOGD: I agree with that.

09:22:25 23 THE COURT: And now, you want to take up a

09:22:27 24 specific issue with Google.

09:22:28 25 MR. DEVOOGD: I do, your Honor. And I guess I

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09:22:32 1 would start with a question that I think applies to a
 09:22:36 2 number of the defendants, and that is whether post-suit
 09:22:41 3 allegations are permissible to keep the claims in.
 09:22:49 4 So we can see that at least some of the
 09:22:52 5 defendants did not have actual notice. Now, setting aside
 09:22:55 6 the willful blindness aspect of it, but we can see that
 09:23:00 7 some of the defendants did not have actual notice as to
 09:23:03 8 some of the patents. They certainly are aware of them
 09:23:07 9 between the filing of the initial complaint and the filing
 09:23:10 10 of the amended complaint.
 09:23:13 11 I know that there is some divergence in the
 09:23:17 12 district courts as to whether that post-complaint notice
 09:23:26 13 period is essentially in the case and adequately pled for
 09:23:30 14 purposes of the allegations that we're talking about here.
 09:23:36 15 So totally understand the Court's direction and admonition
 09:23:40 16 and the proposed compromise related to the pre-suit
 09:23:45 17 allegations.
 09:23:46 18 I guess I just seek a little clarification as to
 09:23:49 19 your view on the post initial complaint time period, and
 09:23:53 20 I'd be happy to explain why I think that's appropriate.
 09:23:56 21 THE COURT: Go ahead, please.
 09:23:58 22 MR. DEVOOGD: Okay. So as I read the cases,
 09:24:02 23 basically the Eastern District of Texas and Delaware are
 09:24:06 24 nearly unanimous that post-complaint notice satisfies the
 09:24:14 25 knowledge requirement for both enhanced damages claims and

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09:25:45 1 situation that exists in literally every patent
 09:25:49 2 infringement case. And thus, notice provided by the
 09:25:53 3 complaint does not remove a case from a garden-variety
 09:25:59 4 patent infringement case to the kind of case that warrants
 09:26:02 5 enhanced damages, which is what Halo in the Supreme Court
 09:26:04 6 said is required for that kind of award. It has to be
 09:26:09 7 something else. It has to be something that's
 09:26:11 8 characteristic of a pirate.
 09:26:13 9 Likewise, for indirect infringement, whether it's
 09:26:14 10 contributory infringement or inducing infringement, the
 09:26:17 11 mere notice provided by a complaint shouldn't provide that
 09:26:20 12 necessary knowledge and intent because merely continuing
 09:26:24 13 that conduct after you've been sued doesn't provide that
 09:26:30 14 knowledge of or intent to infringe the patent that is
 09:26:34 15 required for either of those types of indirect
 09:26:36 16 infringement.
 09:26:36 17 THE COURT: Well, let me take a step just short
 09:26:38 18 of that, which is, it seems to me that your arguments are
 09:26:44 19 more on the merits of what -- as opposed to why should I
 09:26:52 20 now allow it to be pled. What, again, in the -- is it
 09:26:57 21 worth the candle but why -- how is Google harmed, for
 09:27:03 22 example, if the allegation is made that anything post
 09:27:09 23 notice in the original complaint, an allegation is made
 09:27:14 24 that the conduct subsequent to that is willful.
 09:27:20 25 Are you saying, should the Court as a matter of

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09:24:18 1 inducement and contributory infringement.
 09:24:22 2 Now, some of the defendants have downplayed those
 09:24:27 3 cases and said they're against the weight of precedent.
 09:24:33 4 From my perspective, I would argue that you have two of
 09:24:37 5 the busiest patent dockets in the country with judges who
 09:24:40 6 see these patent cases all the time, and I think it would
 09:24:45 7 behoove us to give due weight to the cases coming out of
 09:24:49 8 those districts. I think there's at least a dozen in
 09:24:52 9 Delaware and nearly that many in the Eastern District of
 09:24:56 10 Texas.
 09:24:58 11 So with that, I can.
 09:24:59 12 THE COURT: Let me hear from Google or anyone
 09:25:04 13 else who wants to argue that.
 09:25:05 14 Mr. Snyder.
 09:25:11 15 MR. SNYDER: Good morning, your Honor. Darin
 09:25:14 16 Snyder of O'Melveny Myers on behalf of Google and LG.
 09:25:16 17 Which of those issues would the Court prefer I
 09:25:19 18 start with?
 09:25:20 19 THE COURT: I would start with the what happens
 09:25:22 20 when Google finds out in the original complaint that they
 09:25:27 21 are infringing -- alleged to be infringing the 123 patent.
 09:25:31 22 Does that satisfy post that date a claim of willful
 09:25:38 23 infringement?
 09:25:40 24 MR. SNYDER: It should not, your Honor.
 09:25:42 25 As the Court said in M & C Innovations, that's a

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09:27:23 1 law just say that can never happen? Why wouldn't it be
 09:27:28 2 the wiser course -- not the happier course for Google, but
 09:27:30 3 why wouldn't it be the wiser course for the Court to allow
 09:27:34 4 the allegation to be made and discovery taken, whatever
 09:27:41 5 else happens, and then, the issue can be resolved, if
 09:27:44 6 you're right with respect to it being a matter of law, on
 09:27:48 7 a summary judgment at the time summary judgment -- as
 09:27:52 8 opposed to at this juncture?
 09:27:55 9 MR. SNYDER: There aren't any disputed facts
 09:27:58 10 about the knowledge that is provided by the complaint.
 09:28:01 11 And we believe that as a matter of substantive law, the
 09:28:05 12 knowledge merely provided by the complaint can't provide
 09:28:09 13 the knowledge and intent necessary to satisfy the
 09:28:13 14 willfulness or indirect infringement elements.
 09:28:17 15 That literally occurs in every case. I'm not
 09:28:20 16 sure, your Honor, what discovery the plaintiff would need
 09:28:22 17 to take were you, in fact, served with a complaint. Yes,
 09:28:25 18 we were served with a complaint. We're here today. So
 09:28:28 19 Google is obviously aware of the allegation. But that
 09:28:32 20 does not remove this case or any other case because the
 09:28:36 21 knowledge would be identical in every other case from the
 09:28:40 22 realm of a garden-variety patent litigation to the realm
 09:28:43 23 of behavior characteristic of a pirate that shows
 09:28:47 24 intentional misconduct that should justify an award of
 09:28:52 25 willful or exemplary damages.

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09:28:53 1 So the damage that's done to Google is the
 09:28:56 2 exposure that's created merely by those allegations. And
 09:28:59 3 as the Court indicated this morning, the presence of those
 09:29:03 4 allegations when there is no factual basis for them is
 09:29:06 5 problematic. Likewise, the presence of those allegations
 09:29:09 6 when as a matter of law, they should not be sufficient is,
 09:29:13 7 likewise, problematic.

09:29:15 8 THE COURT: So if -- would it be your position
 09:29:20 9 that if I were to say I'm not going to dismiss the tranche
 09:29:25 10 of willfulness claims that start with the filing of the
 09:29:29 11 original complaint, would that be something that could be
 09:29:32 12 taken up -- it would be sufficiently final, it could be
 09:29:37 13 taken up in interlocutory appeal?

09:29:39 14 MR. SNYDER: The Court could fashion a ruling
 09:29:42 15 that could do that. I'm not sure that -- my imagination
 09:29:48 16 isn't broad enough to say categorically, there will never
 09:29:52 17 be a situation in which post-complaint conduct could
 09:29:56 18 justify a willfulness award. There may be such a
 09:29:59 19 situation, and that can be treated by your Honor and this
 09:30:02 20 court exactly the same way as pre-suit notice.

09:30:06 21 If they take their discovery and they believe
 09:30:08 22 that they have justification for amending their complaint,
 09:30:12 23 they can timely bring that to your Honor if the parties
 09:30:15 24 don't stipulate to it.

09:30:17 25 THE COURT: And my only other question is -- and

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09:31:34 1 in each one of these cases, whether we're talking about
 09:31:36 2 the preceding case by Intellectual Ventures, or the other
 09:31:40 3 Parus cases, or the case that's going to follow us, there
 09:31:43 4 was notice to the defendants provided by the complaint.

09:31:47 5 So if it's not going to be dismissed -- there
 09:31:50 6 would not be a basis for dismissing any of those cases
 09:31:54 7 without prejudice, subject to amendment, if the Court is
 09:31:57 8 going to allow mere notice provided by the complaint to
 09:32:00 9 suffice.

09:32:05 10 THE COURT: Anything else?

09:32:05 11 MR. SNYDER: Nothing further, your Honor.

09:32:06 12 THE COURT: Any response or anything additional?
 09:32:10 13 Yes, sir.

09:32:11 14 MR. RANGANATH: Good morning, your Honor. Ravi
 09:32:13 15 Ranganath for Amazon.

09:32:15 16 I just wanted to address one thing because I will
 09:32:17 17 acknowledge that the rule does appear to be unanimous in
 09:32:19 18 east Texas that notice -- their complaint filing is
 09:32:23 19 sufficient. I do not agree that it's the unanimous rule
 09:32:26 20 of Delaware. I think we cited in our papers an opinion
 09:32:29 21 from Judge Connolly from this last year where he says the
 09:32:33 22 complaint itself cannot serve as a basis for defendant's
 09:32:36 23 actionable knowledge. The purpose of a complaint is not
 09:32:39 24 to create a claim, but to obtain relief for an existing
 09:32:42 25 claim. And that's the VLSI case out of Delaware.

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09:30:21 1 the reason I asked about the interlocutory appeal is, is
 09:30:28 2 this something that would be better -- rather than just
 09:30:30 3 having district judges in the courts in Delaware, in the
 09:30:34 4 Eastern District, and perhaps me deciding, wouldn't it be
 09:30:38 5 better if the circuit told us? I mean, it seems like a
 09:30:40 6 pretty bright-line rule that one oughta.

09:30:45 7 MR. SNYDER: I am sure that getting direction
 09:30:47 8 from the Federal Circuit would help resolve the known
 09:30:49 9 conflict among the districts. Plaintiff's counsel is
 09:30:51 10 correct that there are some courts in this country that
 09:30:54 11 will allow allegations of willfulness or indirect
 09:30:57 12 infringement to go forward, based on the notice provided
 09:30:59 13 by the complaint.

09:31:00 14 That is inconsistent with the decisions of this
 09:31:04 15 district so far, but I do acknowledge that there is a
 09:31:08 16 difference.

09:31:09 17 THE COURT: I mean, that's really the problem I'm
 09:31:11 18 having is, it doesn't really seem like -- I mean, I get
 09:31:15 19 that we all have -- we have to make the initial decision.
 09:31:18 20 But it would be nice for the circuit to tell us one way or
 09:31:22 21 the other.

09:31:22 22 MR. SNYDER: It would be good to have that
 09:31:25 23 direction, your Honor, but the kind of plan that the Court
 09:31:27 24 outlined at the beginning of this hearing assumes that
 09:31:31 25 notice provided by the complaint is insufficient. Because

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09:32:46 1 So just wanted to note that even within
 09:32:49 2 districts, there seems to be some split here. So I would
 09:32:52 3 hardly describe it as a unanimous rule of Delaware.

09:32:55 4 THE COURT: And which Delaware judges have gone
 09:32:58 5 the other way?

09:32:59 6 MR. RANGANATH: I'm aware of, I believe, Judge
 09:33:01 7 Andrews and possibly Judge Stark.

09:33:03 8 THE COURT: Okay.

09:33:10 9 MS. RAHEBI: Your Honor.

09:33:10 10 THE COURT: Yes, ma'am.

09:33:10 11 MS. RAHEBI: If I could address for Apple.

09:33:11 12 We agree with the law and it is mixed. But I
 09:33:14 13 would just say that under the not-worth-a-candle doctrine,
 09:33:16 14 we will end up -- you know, once they take discovery, if
 09:33:19 15 there's a case to proceed, at least for now, we can have
 09:33:23 16 and have a simpler case until we get to the discovery
 09:33:25 17 period, and we think it resolves this issue. Thank you.

09:33:29 18 THE COURT: Yes, sir. Yes, ma'am.

09:33:32 19 MS. MAROULIS: Your Honor, Victoria Maroulis,
 09:33:35 20 counsel for Samsung.

09:33:36 21 The only willfulness allegations against Samsung
 09:33:39 22 are based on both filing, meaning the notice of the
 09:33:42 23 complaint. So I just wanted to register agreement with
 09:33:45 24 counsel for Google that to the extent the Court is
 09:33:50 25 dismissing these claims without prejudice, the Court is

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09:33:53 1 recognizing that the filing of the complaint is not
 09:33:56 2 sufficient without any additional facts to constitute
 09:33:59 3 basis for willfulness.
 09:34:01 4 Thank you.
 09:34:01 5 THE COURT: Well, I think what I'm -- what I'm
 09:34:05 6 wrestling with is that absent something additional to
 09:34:11 7 that, I think that's probably right. I don't know that
 09:34:14 8 it's quite as bright a line as you're suggesting.
 09:34:18 9 MS. MAROULIS: Your Honor, there are a couple of
 09:34:20 10 cases out there that I believe Parus cited, perhaps
 09:34:27 11 Bio-Rad in Delaware or Bobcar. In those cases, while it's
 09:34:29 12 not very clear from the decisions exactly happened, it
 09:34:31 13 appears that, in addition to the complaint, there were
 09:34:33 14 some additional facts, a protracted licensing negotiation.
 09:34:37 15 Some head-to-head competition of the facts that may take
 09:34:41 16 it out of what counsel for Google referred to as
 09:34:45 17 garden-variety willfulness claims. That just because
 09:34:47 18 you're sued, you are now willfully -- alleged to willfully
 09:34:51 19 infringe.
 09:34:51 20 THE COURT: And you can answer this and anyone
 09:34:52 21 else can, as well.
 09:34:54 22 Should it make any difference whether or not the
 09:34:58 23 patent that's being asserted is being asserted by a
 09:35:01 24 competitor, rather than someone who is not a competitor,
 09:35:03 25 with regard to -- in other words, again, I'm just making

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09:36:36 1 THE COURT: Anything else from defense?
 09:36:39 2 MS. MAROULIS: Thank you, your Honor.
 09:36:40 3 THE COURT: Counsel.
 09:36:46 4 MR. DEVOOGD: Thank you, your Honor.
 09:36:47 5 Before I address the substance of those
 09:36:49 6 arguments, I neglected to introduce my colleagues and
 09:36:53 7 client reps, if you'll allow me.
 09:36:56 8 THE COURT: That may be the worst mistake you
 09:36:57 9 could ever make.
 09:37:00 10 MR. DEVOOGD: I was reminded of that, your Honor.
 09:37:02 11 Michael McNamara is lead counsel and Courtney
 09:37:05 12 Herndon is my colleague. And also, Texas trial counsel
 09:37:09 13 from Ward Smith & Hill, Johnny Ward is here, as well.
 09:37:13 14 We've also got the CEO of Parus, Taj Reneau, and the GC,
 09:37:17 15 Robert McConnell.
 09:37:18 16 THE COURT: Well, and let me take the time to
 09:37:21 17 thank anyone who is here. I don't know if it's
 09:37:25 18 voluntarily, but more voluntarily than the lawyers who had
 09:37:27 19 to come. I think this is the best thing about our
 09:37:35 20 judicial system is that you all -- it's -- everything's
 09:37:38 21 done in public, and I think everyone oughta be here
 09:37:41 22 measuring how I perform as well as how your lawyers
 09:37:44 23 perform. So it always heartens me when clients take the
 09:37:49 24 time to attend hearings like this. Specifically, with
 09:37:53 25 respect to your client representatives, I welcome them to

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09:35:07 1 this up. Two names, Dell and HP, for lack of -- but if
 09:35:14 2 Dell were to sue HP and give it notice -- once it had the
 09:35:19 3 notice of the patent, should it make any difference in
 09:35:22 4 terms of the willfulness determination the fact that HP
 09:35:26 5 continued to compete with Dell and selling allegedly
 09:35:31 6 infringing products, as opposed to situation where the
 09:35:34 7 plaintiff is an entity who just owns the patent?
 09:35:38 8 MS. MAROULIS: Your Honor, I believe that that
 09:35:41 9 alone does not make any difference with its competitors or
 09:35:45 10 nonpracticing entity versus operating company. What I was
 09:35:48 11 referring to, what I think some of the cases that Parus
 09:35:51 12 cites referred to is more situations where there's some
 09:35:55 13 additional indicia of willfulness. And it may be the case
 09:35:58 14 that in the competitor cases, that occurs more frequently
 09:36:02 15 because the companies monitor each other, they are in the
 09:36:05 16 stream of commerce. But it's going to depend on
 09:36:08 17 case-by-case basis.
 09:36:09 18 I agree with counsel for Google that as a
 09:36:12 19 bright-line rule, filing a complaint is not enough. One
 09:36:15 20 of the cases defendants cited in their motions said that a
 09:36:19 21 complaint is there to bring relief to a claim, not to
 09:36:22 22 create a new claim. And that's what pure allegations of
 09:36:26 23 willfulness based on post-filing conduct are. We're
 09:36:32 24 creating a claim by just saying there is willfulness, and
 09:36:34 25 that is the difference.

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09:37:56 1 Austin.
 09:37:57 2 MR. DEVOOGD: Thank you, your Honor.
 09:37:57 3 THE COURT: And so, if you'd like to continue.
 09:37:59 4 MR. DEVOOGD: Absolutely, your Honor.
 09:38:00 5 And Mr. Snyder said something I thought was
 09:38:03 6 noteworthy. He said he could imagine a situation --
 09:38:05 7 THE COURT: That would be a first. Sorry.
 09:38:11 8 MR. SNYDER: Thank you, your Honor.
 09:38:12 9 MR. DEVOOGD: I'll leave that one on the table,
 09:38:14 10 your Honor.
 09:38:14 11 He said he could imagine a situation in which
 09:38:19 12 there could be some evidence supporting a -- an enhanced
 09:38:25 13 damages award, based on post-complaint conduct, and that,
 09:38:30 14 to me, is the point. As the Court said in the Blitzsafe
 09:38:37 15 case, the notice of the filing of the complaint, coupled
 09:38:41 16 with a plea for enhanced damages, plausibly supports an
 09:38:49 17 presence of an intentional redoubling of infringement
 09:38:52 18 activity, which is just as plausible as the fact that
 09:38:56 19 they've lawyered up and are going to fight the case
 09:38:59 20 vigorously.
 09:39:00 21 And it's not for the Court, at this point, at the
 09:39:04 22 pleadings stage, to determine whether inferences that are
 09:39:10 23 -- might be more plausible than not, or could be
 09:39:15 24 improbable once evidence comes before the Court later,
 09:39:19 25 should be tossed out at the pleadings stage. And that's

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09:39:22 1 really the point on that, your Honor.

09:39:26 2 As to the purpose of the complaint, I know there

09:39:31 3 is case law, and counsel for defendants cited it,

09:39:35 4 suggesting that a complaint does not serve a purpose of

09:39:40 5 creating a new cause of action. There's a recent case out

09:39:45 6 of Delaware from your colleague, Judge Connolly. It's the

09:39:51 7 Boston Scientific vs. Nevro case. And I can send the cite

09:39:59 8 to Dr. Yi after the hearing, if you'd like.

09:40:02 9 That case -- in that case, Judge Connolly notes

09:40:05 10 that Section 284 allows district courts to punish the full

09:40:11 11 range of culpable behavior. And I'll just put a bookmark

09:40:18 12 there because I want to take us back to Halo because

09:40:20 13 that's a very important point. But Judge Connolly went on

09:40:22 14 to say that in the majority of patent cases today -- and,

09:40:26 15 to be candid, our pleadings make the same, I think, error

09:40:32 16 in terminology of making allegation for a claim of willful

09:40:40 17 infringement.

09:40:42 18 But requests for enhanced damages under 284 are

09:40:46 19 not a claim for relief. They're requests that the Court

09:40:51 20 exercise its discretion, based on all the facts and

09:40:57 21 circumstances before and after the evidence is adduced and

09:41:02 22 placed into the record as to whether enhanced damages are

09:41:05 23 appropriate.

09:41:05 24 Now, Mr. Snyder also said that those enhanced

09:41:09 25 damages are only appropriate if the defendant acts like a

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09:43:09 1 Google-specific issues unless you'd like to hear from

09:43:12 2 defendants.

09:43:12 3 THE COURT: Let me hear from anyone who wants to

09:43:14 4 stand up because I do have a couple of more questions.

09:43:16 5 Mr. Snyder, you might be the obvious person.

09:43:20 6 MR. DEVOOGD: Thank you, your Honor.

09:43:23 7 THE COURT: And I guess where I'm torn here is,

09:43:26 8 why since it's up to me to make this decision, correct,

09:43:32 9 about whether or not Google in this case acted -- whoever

09:43:37 10 it is, acted willfully. It seems to me, if the case gets

09:43:47 11 filed, they give you the notice of the 123 patent, you

09:43:53 12 defend it vigorously and we go all the way through trial,

09:44:01 13 how is the system better off with me not just at the end

09:44:07 14 of trial -- regardless of whether Google wins or loses

09:44:11 15 because I will have gotten to -- if Google wins, then if

09:44:14 16 the issues goes away altogether. I get that. But if the

09:44:17 17 plaintiff wins, I would, at that point, then be able to

09:44:21 18 assess whether or not I thought that the defense that

09:44:24 19 Google raised was in good faith or not. Presumably, it

09:44:30 20 would be. You've tried it all the way through the case,

09:44:33 21 you've put on experts and all that. And then, I don't

09:44:38 22 think one will be able to find willfulness as a result of

09:44:41 23 that.

09:44:41 24 I guess is the issue whether or not just

09:44:49 25 knowledge is sufficient? Is that your point?

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09:41:15 1 pirate. But here's what the Halo court actually said.

09:41:19 2 The chief justice wrote that the sort of conduct

09:41:22 3 warranting enhanced damages has been variously described

09:41:26 4 as willful, wanton, malicious, bad faith, deliberate,

09:41:30 5 consciously wrongful, flagrant or, indeed, characteristic

09:41:36 6 of a pirate. The disjunctive is important here.

09:41:41 7 Back to my earlier comments about the recognition

09:41:45 8 of Justices Kavanaugh and Sotomayor and Kagan during the

09:41:51 9 Romag Fasteners argument last week, culpable conduct

09:41:55 10 worthy of enhanced damages is a sliding scale. And the

09:42:00 11 worst is an intentionally malicious pirate who goes out

09:42:05 12 seeking with actual knowledge of the patent in order to,

09:42:10 13 you know, undermine their competitors' advantage in the

09:42:15 14 marketplace, or something like that. That's piracy and we

09:42:18 15 can agree on that.

09:42:19 16 But there are other flavors of culpable conduct

09:42:24 17 warranting enhanced damages. So the point of that is that

09:42:33 18 the notice requirement is -- it serves one purpose, and

09:42:37 19 that is to put the defendants on notice of the existence

09:42:40 20 of a patent. We're talking about actual notice here. And

09:42:44 21 so, I don't see the difference, frankly, between me

09:42:48 22 sending a letter to Google saying, you infringe the 123

09:42:54 23 patent, or me filing a complaint, articulating in far

09:42:58 24 greater detail you infringe the 123 patent and here's why.

09:43:05 25 So with that, I'd like to turn to the

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09:44:51 1 MR. SNYDER: Well, a few things, your Honor.

09:44:56 2 We know from the Supreme Court that knowledge of

09:44:59 3 the patent is not sufficient to award exemplary damages.

09:45:02 4 THE COURT: Right.

09:45:03 5 MR. SNYDER: There has to be knowledge of

09:45:05 6 infringement. And that knowledge of infringement and that

09:45:09 7 conduct has to go far beyond mere knowledge of the patent

09:45:13 8 to what the Supreme Court described as willful, wanton,

09:45:17 9 malicious, bad faith, et cetera. Those are serious

09:45:22 10 accusations, whether they're in the patent infringement

09:45:25 11 context or any other context.

09:45:27 12 So merely -- mere knowledge of the patent and a

09:45:31 13 mere accusation of infringement does not satisfy that

09:45:35 14 standard.

09:45:38 15 THE COURT: And that's why -- I guess what I'm

09:45:40 16 saying is, so the likelihood of a competent judge finding

09:45:45 17 that you acted that way at the end of trial is pretty

09:45:49 18 remote, even if that allegation still exists.

09:45:51 19 MR. SNYDER: And I guess that leads to my second

09:45:53 20 point, your Honor. At the time that the complaint is

09:45:56 21 filed, that conduct post-complaint cannot exist because it

09:46:01 22 hasn't happened yet. And we engage in all kinds of logic

09:46:07 23 games in the law, but we haven't yet flipped around the

09:46:11 24 passage of time that it goes in the other direction.

09:46:13 25 When the plaintiff signs the complaint, says here

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09:46:17 1 is my good-faith belief of infringement, at that point,
09:46:22 2 there can be no allegations of post-complaint conduct with
09:46:25 3 knowledge of infringement that would raise to the level of
09:46:31 4 justifying exemplary damages. And that's what led to my
09:46:33 5 comment --
09:46:33 6 THE COURT: Well, then, how could all these
09:46:35 7 judges say that it does?
09:46:37 8 MR. SNYDER: I don't believe that they should,
09:46:39 9 your Honor. I think that that is inconsistent with what
09:46:42 10 the Supreme Court has said and that guidance. And we
09:46:45 11 don't yet have guidance from the Federal Circuit on the
09:46:48 12 Supreme Court in this narrow circumstances the Court has
09:46:51 13 already pointed out. But that doesn't mean that that
09:46:55 14 guidance wouldn't be forthcoming. And I think we can see
09:46:58 15 the direction the wind is blowing, based on what the
09:47:01 16 Supreme Court has said.
09:47:02 17 Halo made it very clear that you need something
09:47:05 18 more than mere knowledge. Now, to be fair, the Supreme
09:47:09 19 Court has also recognized that actual knowledge may not be
09:47:12 20 required. There are some situations where willful
09:47:17 21 blindness is satisfactory. But the Supreme Court is
09:47:19 22 giving guidance on that, as well; and in that circumstance
09:47:22 23 as it said in Global Tech, you still need to have a
09:47:27 24 subjective belief and a high likelihood of infringement.
09:47:31 25 Mere knowledge of the patent does not provide that.

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09:48:59 1 think we'd like you to -- maybe you'd like to pay us some
09:49:03 2 money for them. Here is one of many patents that we have.
09:49:06 3 There was no allegation of infringement. And even the
09:49:09 4 instrumentalities that are accused of infringement in this
09:49:12 5 case didn't exist. In fact, they didn't exist for nine
09:49:16 6 years.
09:49:17 7 So when Parus provided notice of the patent, they
09:49:24 8 certainly didn't provide notice of infringement and no
09:49:27 9 basis for Google to believe that it was infringing. And
09:49:30 10 that is what is required for exemplary damages and that is
09:49:33 11 what's absent. So even the mere -- the mere fact of
09:49:35 12 notice of a patent doesn't provide the notice of
09:49:38 13 infringement that I think is really required to make that
09:49:41 14 next step and allow the case to proceed with an allegation
09:49:44 15 of willful infringement that would justify exemplary
09:49:49 16 damages.
09:49:49 17 THE COURT: Okay. Got it.
09:49:57 18 Counsel.
09:50:03 19 MR. DEVOOGD: Thank you, your Honor.
09:50:04 20 THE COURT: Yes, sir.
09:50:05 21 MR. DEVOOGD: Again, I want to emphasize that at
09:50:07 22 the pleadings stage, whether an allegation is plausible is
09:50:11 23 a binary determination. We don't get to weigh whether an
09:50:16 24 inference is more likely or not or improbable or not. If
09:50:19 25 it's plausible, it's plausible, and the pleading passes

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09:47:33 1 So that was my point about in response to the
09:47:37 2 Court's question, can they still perhaps come back to the
09:47:41 3 Court and move to amend to add allegations of willfulness,
09:47:45 4 based on post-complaint conduct? And my point there is
09:47:49 5 not that that's always going to occur. My point is that
09:47:52 6 there may be some universe in which that set of facts
09:47:56 7 would lead the Court to allow them to make that amendment.
09:48:00 8 It's probably unlikely. But is it theoretically possible?
09:48:03 9 My imagination isn't big enough to completely exclude that
09:48:07 10 possibility.
09:48:07 11 But merely going ahead and defending yourself
09:48:12 12 after you've been accused of infringement should not be
09:48:14 13 enough to provide that kind of exemplary damages or right
09:48:19 14 to exemplary damages, which is what they're arguing.
09:48:22 15 This actually has consequence in the context of
09:48:24 16 the Google case, your Honor, in this Google case. Of the
09:48:28 17 two patents that are accused, one of those patents, the
09:48:34 18 431 patent, was something that was identified by Parus to
09:48:39 19 Google during some licensing negotiations that occurred
09:48:41 20 more than a decade ago, and the distinction between
09:48:45 21 knowledge of a patent and knowledge or belief of
09:48:48 22 infringement becomes very important in this context.
09:48:50 23 In '07, when that notice was provided, it was not
09:48:53 24 in the context of saying, Google, we think you infringe
09:48:56 25 this patent. It was, we have a portfolio of patents. We

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09:50:22 1 muster under Twombly.
09:50:24 2 As to the notion that knowledge of infringement
09:50:27 3 can't be conveyed by a complaint, our complaints in this
09:50:33 4 case, and including the one against Google, are some 25 or
09:50:36 5 30 pages long, with 100 different discrete paragraphs
09:50:42 6 making out detailed allegations, mapping the claims of the
09:50:45 7 patents to the accused instrumentalities. So I'm not sure
09:50:50 8 how that moves the needle for Mr. Snyder.
09:50:53 9 As to the specifics of the Google circumstance
09:50:58 10 here, it was much more than just a discussion about
09:51:02 11 licensing. So back in 2007 -- and this is laid out in the
09:51:06 12 complaint -- representatives from Parus met with Google
09:51:11 13 and made a presentation regarding their innovative
09:51:16 14 technology and informed them of foundational patents in
09:51:23 15 this voice recognition space. Among those patents, as
09:51:27 16 Google now concedes, was the 431 patent, which is the
09:51:32 17 parent of the 084 patent.
09:51:34 18 During that management presentation, Parus
09:51:41 19 introduced Google to its business and made a detailed
09:51:45 20 presentation about the technology and the patents.
09:51:50 21 There's some very carefully worded language in the motion
09:51:57 22 to dismiss where Google says, well, Google Assistant,
09:52:01 23 which is the instrumentality of Google that we're pointing
09:52:10 24 for at least some of the elements, didn't come into
09:52:13 25 existence until 2016. But they made no mention of any

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09:52:18 1 predecessor product like the Google Voice Search or Google
09:52:22 2 Now, which I believe -- this isn't in the papers, so take
09:52:27 3 it for what it's worth. But based on our investigation,
09:52:31 4 Google Voice Search at least was rolled out a little over
09:52:35 5 a year after Parus made this technology presentation.
09:52:40 6 So from our perspective, there is no doubt, and
09:52:44 7 they concede it, that they had actual notice of the 431
09:52:49 8 patent at least as early as 2007.
09:52:53 9 With respect to notice of infringement, from our
09:52:55 10 perspective, it is a plausible inference that Google,
09:53:01 11 which is a highly sophisticated, well-heeled technology
09:53:06 12 company with much at stake in products that they roll out,
09:53:11 13 such as something like Google Assistant, which they're
09:53:16 14 touting all over the place as the next best thing in
09:53:19 15 voice-assisted technology, would not only be aware of,
09:53:28 16 based on their extensive technical diligence, which is
09:53:34 17 also alleged, that a team of both patent attorneys and
09:53:36 18 technical assets conduct detailed diligence not only on
09:53:41 19 the patents that Parus presented but the technology that
09:53:45 20 Parus presented. And there's no rebuttal for that.
09:53:48 21 And in any event, you need to take those factual
09:53:51 22 allegations pled as true. So the notion that it's somehow
09:54:04 23 implausible that Google could have been aware of
09:54:06 24 infringement of the 431 patent at least as early as 2007,
09:54:11 25 it could be true. I don't know. But that's not for us to

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09:54:14 1 decide right now. The point is that a reasonable
09:54:18 2 inference can be drawn, based on the allegations in the
09:54:20 3 complaint, that Google had notice not only of the 431
09:54:25 4 patent but, also, of its infringement of that patent. So
09:54:28 5 that's the 431.
09:54:29 6 As to the child, there is case law standing for
09:54:32 7 the proposition that a plaintiff cannot rely on a pending
09:54:40 8 patent application standing alone for purposes of the
09:54:48 9 notice requirement. I concede that. But there's a whole
09:54:50 10 lot more here in the allegations that we've pled taken as
09:54:54 11 true, drawing all reasonable inferences in our favor as we
09:54:59 12 must.
09:55:01 13 For all of the reasons I've already articulated,
09:55:03 14 it almost defies logic to suggest that a company with this
09:55:08 15 much at stake in the space as Google would simply ignore
09:55:14 16 or not investigate the pending applications of these
09:55:20 17 foundational patents flowing from this 2004 meeting.
09:55:24 18 Now, whether or not that's a probable allegation,
09:55:29 19 whether or not we're going to be able to prove that up,
09:55:32 20 that doesn't matter. What matters for today is whether or
09:55:39 21 not the allegations we've made support a plausible
09:55:42 22 inference. And we respectfully submit that based on the
09:55:45 23 facts pled, that is, in fact, a plausible inference,
09:55:52 24 which, therefore, means we pass muster under the pleadings
09:55:57 25 standard.

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09:55:57 1 So unless you have any further questions, I'll
09:55:59 2 step down. Thank you.
09:56:03 3 MS. RAHEBI: Is it possible, your Honor, for me
09:56:04 4 to address on behalf of Apple?
09:56:05 5 THE COURT: Sure.
09:56:05 6 MS. RAHEBI: We agree with Google that it does --
09:56:07 7 the standard does require knowledge of infringement. But
09:56:10 8 I wanted to point out when we're looking at a complaint
09:56:12 9 such as the one against Apple, there is no allegation that
09:56:16 10 we ever even heard of Parus, let alone its patents.
09:56:19 11 So what we're really dealing with is a complaint
09:56:21 12 that's the first time we're hearing that we are being
09:56:24 13 accused. And we believe there's no basis, at that point,
09:56:27 14 to be, for instance, asserting willfulness. And there's
09:56:31 15 nothing in Halo that suggests defending a patent suit
09:56:36 16 alone would rise to that egregious behavior.
09:56:39 17 And we would go back to this court's language and
09:56:41 18 standard in Parity Networks, which is looking at the time
09:56:43 19 of the filing of the complaint. Thank you.
09:56:48 20 THE COURT: Mr. Snyder.
09:56:50 21 MR. SNYDER: Thank you, your Honor.
09:56:54 22 I'd like to start where plaintiff's counsel
09:56:57 23 ended. Plaintiff's counsel argues that they should be
09:57:00 24 allowed to make allegations of willfulness because a
09:57:03 25 company of Google's size and sophistication with, quote,

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09:57:07 1 so much at stake must have known about these patents. As
09:57:12 2 I understood it, that was exactly the point of the Court's
09:57:15 3 initial comments that they would be allowed to take
09:57:19 4 discovery on this issue. And that's exactly the kind of
09:57:21 5 thing that should be determined with real facts, as
09:57:24 6 opposed to speculation, which is all that exists right
09:57:29 7 now.
09:57:29 8 The only evidence that they have of any knowledge
09:57:32 9 is this presentation that was made in 2007, long before
09:57:37 10 any of the accused instrumentalities even existed, and
09:57:40 11 that relates only to one patent. So if that is the basis,
09:57:44 12 and it seems that it is, then that feeds precisely into
09:57:48 13 this court's suggested approach, which is to dismiss these
09:57:51 14 allegations, give the plaintiffs an opportunity to take
09:57:54 15 discovery, and if they have facts to support these
09:57:57 16 allegations, then they can put them in an amended
09:58:00 17 complaint and the case can proceed. So that's the first
09:58:04 18 point.
09:58:04 19 The second point, your Honor, is that the
09:58:07 20 allegations or the description in the argument of the
09:58:10 21 notice as to the first of the patents, the 431 patent, is
09:58:13 22 very different than what is in the complaint. In the
09:58:17 23 first amended complaint against Google, there are two
09:58:19 24 paragraphs that talk about this presentation, paragraph 20
09:58:22 25 and paragraph 21. There is no allegation in either of

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09:58:26 1 those paragraphs that Google was accused at that time of
09:58:32 2 infringing any of the patents. It was justified provided
09:58:33 3 with some notice. That is not enough.
09:58:37 4 If discovery later indicates that somehow, Google
09:58:41 5 understood that it was infringing, or that there was a
09:58:44 6 high likelihood that it was infringing one of these
09:58:47 7 patents, that would be a different issue. But that does
09:58:49 8 not exist yet.
09:58:50 9 And they couldn't logically have alleged that the
09:58:54 10 instrumentalities at issue in this case infringe because
09:58:58 11 they didn't exist for nearly a decade, until a decade
09:59:01 12 later. That is the 431 patent.
09:59:04 13 Last, your Honor, I want to make a point as it
09:59:07 14 relates to the second patent in this case, the 084 patent.
09:59:11 15 Plaintiff's counsel described that as the child of the 431
09:59:15 16 patent. I think that stretches the truth a little bit. I
09:59:18 17 think if you follow the generations, it might be the
09:59:22 18 great-great grandchild. It's five generations removed.
09:59:25 19 The application wasn't even filed until five years after
09:59:28 20 this meeting in '07.
09:59:30 21 And it really does strain credulity to say that
09:59:34 22 Google would be on notice of an application that didn't
09:59:36 23 exist for five years and a patent that wasn't issued for
09:59:40 24 almost nine years. In all of the -- in the context of
09:59:44 25 both of these patents, your Honor, the approach that the

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09:59:47 1 Court described at the outset of the hearing would be
09:59:50 2 acceptable to Google and, we would think, would be the
09:59:52 3 proper way to deal with a situation in which the
09:59:55 4 allegations of even notice of the patent are so scant but,
09:59:59 5 most importantly, notice of any knowledge, or of
10:00:04 6 infringement, or high probability of infringement is
10:00:06 7 completely lacking.
10:00:09 8 THE COURT: Anything else?
10:00:11 9 MR. DEVOOGD: Just one final comment, your Honor.
10:00:20 10 I won't belabor the ground that I've already covered.
10:00:23 11 Under clear Fifth Circuit law, especially where
10:00:28 12 the relevant information is beyond the access of the
10:00:31 13 plaintiff, courts should generally permit discovery to
10:00:35 14 proceed unless the complaint recites no more than sheer
10:00:38 15 speculation. All right. Absent that, the claims should
10:00:46 16 stay in the pleading as it exists.
10:00:48 17 And I would cite for that proposition, the Wooten
10:00:51 18 vs. McDonald case that's in our in briefs.
10:00:54 19 THE COURT: Well, I'll tell you all, I'm very
10:00:56 20 torn. But here's what I'm going to do and you all are
10:01:00 21 just going to be the -- have to be the guinea pigs because
10:01:03 22 I have to do something. And by you all, I mean
10:01:06 23 collectively guinea pigs.
10:01:08 24 I've thought pretty hard about what I'm going to
10:01:12 25 try in this case. That doesn't mean that it will turn out

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10:01:15 1 to be right, but I am going to dismiss your claims without
10:01:19 2 prejudice, the plaintiff's claims. I've heard exactly
10:01:23 3 what you've articulated. You will be -- if at the end of
10:01:30 4 the three-month period after discovery, you want to
10:01:35 5 reassert those claims, you'll have leave to do so; and at
10:01:40 6 that point, if the arguments are still where they're at
10:01:44 7 today, then the defendants can take it up on a motion for
10:01:49 8 summary judgment. And that way, we can -- I can actually
10:01:53 9 rule on it as a matter of law, as opposed to -- I don't
10:01:56 10 see a great deal of difference, frankly, between saying
10:02:02 11 I'm allowing it in and having motion for summary judgment
10:02:07 12 as I am saying I'm dismissing without prejudice, letting
10:02:12 13 you know it will be allowed back in if you choose to
10:02:15 14 assert it again at the end of three months, after
10:02:17 15 discovery.
10:02:19 16 I don't see that as being really much different.
10:02:23 17 Either way, if it's in the case -- even if I were to leave
10:02:28 18 it in the case right now, I assume I would be getting a
10:02:30 19 motion for summary judgment, at some appoint, and have to
10:02:35 20 deal with this. So that's -- just to be consistent,
10:02:38 21 that's the way I'm going to do.
10:02:39 22 But I will tell you, I'm certainly -- I certainly
10:02:41 23 understand all the arguments that you've made, and I'm
10:02:43 24 going to have to wrestle with those arguments. And we may
10:02:46 25 even set it for summary judgment hearing if you do

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10:02:48 1 reassert it, and we'll take it up. I'll be better
10:02:52 2 prepared to argue it from that perspective, rather than a
10:02:57 3 perspective of just a motion to dismiss.
10:03:01 4 But I understand -- and I think we need to have a
10:03:06 5 ruling -- it's one way or the other. I mean, I'm not -- I
10:03:09 6 only get to make that decision temporarily until someone
10:03:12 7 tells me. But, you know, I'd certainly hope maybe this
10:03:15 8 will be the kind of case where we would get some guidance
10:03:18 9 afterwards if the case gets far enough along.
10:03:22 10 But I want to make clear, I am dismissing it
10:03:25 11 without preventing you from being able to assert it in the
10:03:29 12 future if you choose to do that, and then, we'll take it
10:03:32 13 up in a different setting.
10:03:35 14 MR. DEVOOGD: May I ask a question, your Honor?
10:03:37 15 THE COURT: Sure.
10:03:37 16 MR. DEVOOGD: That applies to the 431 patent
10:03:39 17 allegation against with Google, as well?
10:03:40 18 THE COURT: Yes.
10:03:41 19 MR. DEVOOGD: Thank you, your Honor.
10:03:42 20 THE COURT: I understand all those arguments.
10:03:44 21 And, like I said, I think I could just as easily say, as
10:03:50 22 asserted, I'm going to defer fact that it was asserted and
10:03:53 23 I should to the defer to the fact that on motion to
10:03:56 24 dismiss, that that's the way to do it. And I just -- I
10:04:00 25 don't see it being all that different than doing it the

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10:04:02 1 way I'm doing it. I don't see any prejudice to the
 10:04:04 2 plaintiff by doing it that way, and I think it lessens any
 10:04:10 3 prejudice that's unnecessary to Google by maintaining it
 10:04:13 4 in a case until you assert it, having had the opportunity.
 10:04:16 5 I'm kind of with Mr. Snyder. I don't know that
 10:04:19 6 you will be able to find any -- and I'm not saying on this
 10:04:25 7 particular one, on the quantum after they have actual
 10:04:30 8 notice, not that there's proof that they did all the
 10:04:33 9 pirate things but --
 10:04:35 10 MR. DEVOOGD: Right.
 10:04:35 11 THE COURT: But that's something that may or may
 10:04:38 12 not get any further after discovery. You will still be
 10:04:41 13 allowed to re-file that claim, regardless of the
 10:04:46 14 discovery. And then, Google, and if they want, can file a
 10:04:49 15 motion for summary judgment and we'll square up, and I'll
 10:04:52 16 make an actual ruling on it, and I'll decide whether or
 10:04:57 17 not to go with the Eastern District in Delaware or the
 10:04:59 18 others. Because they both have compelling reasons why I
 10:05:02 19 think they're right.
 10:05:04 20 MR. DEVOOGD: Understood, your Honor. And I
 10:05:05 21 appreciate that from the pragmatic perspective. The
 10:05:10 22 solution may be elegant from your perspective.
 10:05:13 23 I just want to note, for the record, that I do
 10:05:16 24 share the concerns that Mr. Gilman and, I believe, Morgan
 10:05:22 25 Chu articulated in the VLSI argument, back in August, as

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10:06:29 1 Will your Honor entertain dismissing it in its
 10:06:32 2 entirety?
 10:06:33 3 THE COURT: We would in the same -- under the
 10:06:35 4 same guidelines that I've set here.
 10:06:38 5 MS. VIDAL: Thank you, your Honor.
 10:06:39 6 MR. GILMAN: Can I get some clarification on
 10:06:41 7 that, your Honor?
 10:06:41 8 THE COURT: Sure.
 10:06:42 9 MR. GILMAN: Everything in front of you on the
 10:06:44 10 motion that VMware filed was simply for pre-suit damages.
 10:06:48 11 Are you now saying you're going to dismiss our
 10:06:51 12 indirect infringement claims? Because I think that's in a
 10:06:55 13 wholly different context than what's been argued on
 10:06:56 14 willfulness.
 10:06:56 15 THE COURT: No. I thought we were -- I meant
 10:06:58 16 willfulness.
 10:06:59 17 MR. GILMAN: We don't have a willfulness claim.
 10:07:01 18 So our case is much more narrow --
 10:07:02 19 THE COURT: Let me hear from Ms. Vidal again. I
 10:07:05 20 may have misunderstood.
 10:07:06 21 MS. VIDAL: My understanding -- and maybe I'm not
 10:07:08 22 aware of all the issues that are pending in the other
 10:07:10 23 cases is that your Honor was dismissing indirect
 10:07:12 24 infringement and willfulness in the other cases, based on
 10:07:15 25 the knowledge not being -- the complaint not being

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10:05:27 1 to -- you know, I do not want to be frustrated in
 10:05:30 2 discovery when I'm trying to get information to.
 10:05:33 3 THE COURT: You will not be frustrated in
 10:05:34 4 discovery.
 10:05:35 5 MR. DEVOOGD: Substantiate these allegations.
 10:05:36 6 THE COURT: Okay.
 10:05:37 7 MR. DEVOOGD: Thank you.
 10:05:38 8 THE COURT: You've got my favorite law clerk that
 10:05:40 9 you'll be dealing with in discovery. I have no doubt you
 10:05:43 10 will have no problems in discovery.
 10:05:45 11 MR. DEVOOGD: Thank you very much.
 10:05:47 12 THE COURT: He'll give Google great advice and
 10:05:50 13 counsel on what they should do.
 10:05:52 14 MR. DEVOOGD: I have no doubt. Thank you, your
 10:05:53 15 Honor.
 10:05:56 16 THE COURT: We are going to take just a -- the
 10:06:03 17 next case is slightly different than the facts in this
 10:06:06 18 case. We're going to take just a five-minute break and
 10:06:08 19 then, come back out and resume with the case.
 10:06:10 20 Was that everything with regard to Parus Holdings
 10:06:13 21 against anybody that I needed to take up?
 10:06:16 22 Yes, ma'am.
 10:06:18 23 MS. VIDAL: Your Honor, in view of your recent
 10:06:21 24 rulings in our case, we had only moved to dismiss indirect
 10:06:25 25 infringement based on the pre-suit allegations.

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10:07:18 1 sufficient for knowledge.
 10:07:19 2 Is that?
 10:07:21 3 THE COURT: I am doing that in the other cases
 10:07:23 4 but I don't think -- but Intellectual Ventures hadn't had
 10:07:27 5 a chance to brief on those issues. With regard to
 10:07:30 6 willfulness and post filing the complaint, it probably
 10:07:38 7 would be the same.
 10:07:40 8 MS. VIDAL: Right. And willfulness is not in our
 10:07:42 9 case. It's only indirect infringement.
 10:07:47 10 THE COURT: There's no allegation of willfulness?
 10:07:47 11 MS. VIDAL: There's not. It's only indirect
 10:07:47 12 infringement.
 10:07:47 13 THE COURT: Okay. So I would need to take that
 10:07:50 14 up and give -- I would need to let Intellectual Ventures
 10:07:53 15 --- if you want to move to have those dismissed to file a
 10:07:56 16 motion, I'll hear from Intellectual Ventures. I don't
 10:08:00 17 think we'll need to have another hearing on that. We'll
 10:08:03 18 be able to take that up on the papers. When you said, can
 10:08:05 19 we have the same ruling, I just lost track that there was
 10:08:08 20 no willfulness claim. And so, what I was dealing with
 10:08:11 21 was, I think we can deal with the willfulness in the same
 10:08:16 22 manner as I am in the Parus Holdings cases, but I'm not
 10:08:20 23 prepared until they have a chance to argue the other ones
 10:08:23 24 to rule on that.
 10:08:24 25 MS. VIDAL: Thank you, your Honor.

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10:08:25 1 THE COURT: Okay. Anything else from anyone
10:08:30 2 until -- I'm going to go to the back. I have to do one
10:08:35 3 thing, and then, we'll come back and we'll take up De La
10:08:39 4 Vega vs. Microsoft and Google.
10:14:17 5 (Recess.)
10:14:19 6 THE COURT: The next case I have in front of me
10:14:23 7 is De La Vega vs. Microsoft and vs. Google. And -- yes,
10:14:23 8 sir.
10:14:27 9 MR. DEVOOGD: Andrew Devoogd, your Honor. I
10:14:29 10 apologize for interrupting.
10:14:30 11 THE COURT: No.
10:14:31 12 MR. DEVOOGD: Counsel for defendants in the Parus
10:14:33 13 matters reminded me that I neglected to tell you that we
10:14:37 14 are no longer proceeding with our injunctive relief
10:14:39 15 claims. That was also the subject of some of the
10:14:42 16 briefing. So we will be withdrawing those allegations.
10:14:45 17 THE COURT: Okay. Very good.
10:14:47 18 MR. DEVOOGD: Thank you, your Honor.
10:14:48 19 THE COURT: You're doing that voluntarily. I'm
10:14:50 20 not.
10:14:51 21 MR. DEVOOGD: That is correct. Streamlining the
10:14:54 22 case.
10:14:54 23 THE COURT: Very good.
10:14:55 24 MR. DEVOOGD: Thank you.
25 (End of proceedings.)

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3
4 UNITED STATES DISTRICT COURT)
5 WESTERN DISTRICT OF TEXAS)
6
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